In the

Supreme Court of the United States

OCTOBER TERM, 1924

No. 457

FARMERS & MECHANICS NATIONAL BANK OF FORT WORTH, TEXAS, *Appellant*,

vs.

W. W. WILKINSON, TRUSTEE OF THE WALKER GRAIN COMPANY, BANKRUPT, *Appellee*

APPELLEE'S REPLY TO MOTION FOR REHEARING

GEORGE M. CONNER,
CAPPS, CANTEY, HANGER & SHORT,
MARK MCMAHON,
BOYKIN & RAY,
OBESTER MITCHELL,
Attorneys for Appellee.

In the

Supreme Court of the United States

OCTOBER TERM, 1924

—o—

No. 487

—o—

FARMERS & MECHANICS NATIONAL BANK OF FORT WORTH, TEXAS, *Appellant*,

vs.

W. W. WILKINSON, TRUSTEE OF THE WALKER GRAIN COMPANY, BANKRUPT, *Appellee*

—o—

APPELLEE'S REPLY TO MOTION FOR REHEARING

—o—

Now comes the appellee in the above cause and replying to the motion for rehearing of the appellant herein respectfully shows to the Court:

I.

That all of the contentions advanced in said motion for rehearing were before this Honorable Court on the appeal of the appellant herein, and the motion of the appellee herein to dismiss said cause for want of jurisdiction, and that no new questions are raised in said motion for rehearing

II.

We respectfully beg leave to call attention of the Court to the following statements in said motion for rehearing which are at variance with the record.

(a) The statement made in assignment of error No. 3 on page 4, quoting a part of the trustee's motion before the referee in which the trustee alleged that the payment made to the bank amounted to a preference, omits the further allegation of the trustee in said motion, and the prayer therein that said sum of money be ordered restored to him by summary order. (R. 1-2.)

(b) The statement made upon page 5 of said motion for rehearing to the effect that the appellant appeared before the referee solely to object to the jurisdiction, and that the referee made his order only upon evidence received by him at the general examination of the bankrupt, is not borne out by the record. The record shows that the appellant appeared before the referee in response to notice duly given of the trustee's motion, and in addition to objecting to the jurisdiction, pleaded fully to the merits of the case (R. 3). Furthermore, it is shown that two officers of the bank gave their oral testimony before the referee in connection with the merits of said cause, to-wit, Mr. Renfro, cashier, and Mr. Colvin, president, (Record on proceedings for certiorari from the decision of the Circuit Court of Appeals in this case, pp. 73 and 119, cause No.

828, October 10, 1923, in this Court.) Furthermore, the findings and conclusions of the referee in bankruptcy stated that the evidence upon the merits was fully heard after due notice. (R. 7.)

(c) The statement that the Honorable Circuit Court of Appeals simply dismissed the appeal from the order of the District Court, and denied the petition to superintend and revise taken from that order, without passing upon the merits of the case, is at variance with the record, and also with the decisions of this Honorable Court handed down herein, on January 5th, 1925. See opinion of Circuit Court of Appeals, Fifth Circuit, in this cause, 295 Fed. 120, and certiorari denied by this Honorable Court, 264 U. S. 588.

That this case was adjudicated on the merits by the Circuit Court of Appeals is plainly shown by its opinion rendered herein, *Farmers & Mechanics National Bank v. Wilkinson*, 295 Fed. 120, in which the Court said:

> "We understand it to be well settled that, as to the bankrupt's property, the hands of the bankrupt and of his creditors are stayed from the date of the filing of the bankruptcy petition, and that his estate then passes actually or potentially into the control of the bankruptcy court. Acme Harvester Co. v. Beekman, 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208; Everett v. Judson, 228 U. S. 474, 33 Sup. Ct. 568, 57 L. Ed. 927, 46 L. R. A. (N. S.) 154; Bailey v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275. *There*

is no color of right in the bank to retain money received by it from the bankrupt under the circumstances disclosed in the referee's findings, and the payment to the trustee of the amount so acquired, with interest thereon, may be required by an order in a summary proceeding. Reed v. Barnett National Bank, 250 Fed. 983, 163 C. C. A. 233. (Italics ours.)

"As to the contention that some of the referee's findings were unsupported by the evidence, it is enough to say that the record does not sustain that contention."

From that decision of the Circuit Court of Appeals the appellant here took petition for certiorari to this Court which petition was denied, 264 U. S. 588.

From the above decision it is apparent that appellant's statement that it has had no review in the Circuit Court of Appeals on the merits of the summary order complained of here, is not supported by the record.

(d) Statement in assignment of error No. 7, page 6, that the District Court on the contempt proceeding refused to hear any evidence is at variance with the record as the decree of said Court shows that the Court fully entertained and heard the answer of the respondent bank, to which the affidavits, containing the evidence referred to were attached, and also motion for rehearing thereon, to which said affidavits and additional affidavits were also attached. (R. 47 and 64.)

There is no merit in appellant's contention that it did not receive the money sought to be recovered by the summary order complained of. The evidence is undisputed in the record that the appellant succeeded to all the assets and rights and assumed all liabilities of the defunct American National Bank. Under such circumstances there can be no question but that the successor bank is liable for the accounts of its predecessor. It might be possible that through the mutations of the banking business the successor bank did not come into possession of the identical ear-marked money of its predecessor; but it took over all its assets and thus got the benefit of the said money or its mutations or proceeds. The general rule as to the liability of a corporation which consolidates with another is stated in Vol. 14 A, C. J. 1072, as follows:

> "A consolidated corporation is answerable for the debts, obligations and liabilities of the constituent corporations, whether arising ex contractu or ex delicto. This is true not only where liability is imposed on the consolidated corporation by statute, or by charter of the consolidated company, or by the agreement of the consolidation, but also where the constituent corporations go out of existence without any arrangement as to payment of their debts and liabilities. * * * Outside of debts, liabilities and obligations subsequently incurred by it, for which, of course the consolidated corporation is liable, the liability of the consolidated corporation is for such debts, obligations and liabilities of the constituent corpora-

tions as existed at the date of the consolidation, without enlargement, diminution or modification. It extends to and includes all obligations imposed by charter or by statute upon one of the constituent corporations."

Furthermore, the United States Revised Statutes (1916), Secs. 9662 to 9664, expressly prohibit a National Bank from escaping a debt in the manner here attempted:

"*Art. 9662. Effect of Change of Name or Location.*

"Any national banking association may change its name or the place where its operations of discount and deposit are to be carried on, to any other place within the same state, not more than thirty miles distant with the approval of the Comptroller of the Currency, by the vote of shareholders owning two-thirds of the stock of such association."

"*Art. 9663. Effect of Change of Name on Debts, Liabilities, etc.*

"All debts, liabilities, rights, provisions and powers of the association under its old name shall devolve upon and inure to the association under its new name."

"*Art. 9664. Liabilities and Suits Not Affected by Change of Name.*

"Nothing in this act shall be so construed as in any manner to release any national banking association under its old name or at its old location from any liability or affect any action or proceeding at law in which said association may be or become a party or interested."

We respectfully urge that there is no merit in appellant's assignment of error, and further that in any event, this was a defensive matter which was fully presented, and adjudicated on the merits in the decision of the Circuit Court of Appeals herein above referred to and from which decision petition for certiorari was denied by this Court. As stated by this Court in its opinion herein of January 5th, 1925: "The power here to review that decree had been exhausted; but in any event it could not be exercised upon direct appeal or error."

* * * * * *

However, all of the above matters raised in the motion for rehearing go to the merits of the case heretofore decided by the Honorable Court of Civil Appeals, and certiorari denied by this Honorable Court, and this Honorable Court has held that it has no jurisdiction to entertain this appeal. Furthermore, this Honorable Court has held that it has no jurisdiction to entertain a direct appeal from the order of the District Court imposing a fine for contempt. See opinion of this Honorable Court herein handed down on January 5th, 1925.

* * * * * *

We desire also to call this Honorable Court's attention to the fact that the petition to superintend and revise the said order of the District Court from which the direct appeal was also taken to this Court, was by the Honorable Circuit Court of Appeals, Fifth Circuit, fully adjudicated and denied

by its opinion handed down on January 24th, 1925, a copy of which we are filing herewith. And under the authorities of *Robertson v. Caldwell*, 165 U. S. 559, 41 L. Ed., 745, and *McLisk v. Roff*, 141 U. S. 661, 35 L. Ed. 893, cited to Your Honors in the briefs on the motion to dismiss this cause, the appellant has waived its right, if any it ever had, to be heard in this Court.

WHEREFORE, appellee prays that said motion for rehearing be denied.

Respectfully submitted,

GEORGE M. CONNER,
CAPPS, CANTEY, HANGER & SHORT,
MARK MCMAHON,
BOYKIN & RAY,
ORESTES MITCHELL,
Attorneys for Appellee.

Of Counsel.

THE STATE OF TEXAS }
COUNTY OF TARRANT }

H. C. Ray, being duly sworn, on oath states that he is one of counsel for the appellee herein and that a true copy of the above and foregoing brief and argument has been this day delivered to_____ _____, one of counsel for appellant.

_____

Sworn to and subscribed by H. C. Ray before me this, the _____day of January, 1925.

_____
Notary Public, Tarrant County, Texas.

My commission expires June 1st, 1925.